

July 31, 1767.

A N S W E R S

F O R

JOHN FULLARTON of *Carberry*, Esq;
and others, Trustees of the Turnpike-
roads, and Justices of the Peace, of
the Eastern District of the County
of *Edinburgh*,

T O T H E

P E T I T I O N of WILLIAM MILLAR of
Restalrig, and others.

THE Question before your Lordships is, Whether
or not the small Duty of one Halfpenny *per* Car-
riage can be levied upon the Road leading from
Edinburgh to *Magdalen-bridge*, for every Cart,
Waggon, or Sledge passing thereon to said City, without
a Loading, or loaded with Dung?

The Petitioners maintain, that such Exaction is unnecessa-
ry;—that it is partial and unjust; that it has never been
made since the Date of the Statute, the 12th of Queen *Anne*,
and that it is prohibited, 24th *Georgii Secundi*, from whence
they conclude, that it is not now payable.

The Lord Ordinary, in the Interlocutor complained of, has
very properly thrown the two first Alledgeances altogether

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out of the question; and, whatever Insinuations the Petitioners are pleased to give as to the Respondents Conduct, which, if blameable, ought to have been the Subject of a summary Complaint, the Respondents may, without Vanity, and in Justice to themselves and Brethren, be allowed to say, that there is no County where the publick Funds have been managed with greater Care and Parsimony than that of *Midlothian*, or where Impositions have been laid on with a more sparing and attentive Hand. The great Variety of Roads leading to this Metropolis, as well as the great Repair upon them, rendered a Toll necessary from the most early Periods. It was at first imposed by the Privy-council, and afterwards authorised by Parliament; the Sum to be levied was trifling, and unable to keep the Roads in proper Repair, after the Improvements of Agriculture, and the Introduction of Wheel-carriages, little frequented by our Ancestors, became common. A farther Application to Parliament was therefore necessary, to rescue the Roads from that State of Ruin and Disrepair in which they will be remembered by many of your Lordships; but the Toll obtained had been so sparingly asked, that it too was found insufficient, and an Addition has been since made to it by an after Act of Parliament.

Such has been the general Conduct of the Justices in the County of *Edinburgh*, cautious and progressive in their Demands, proportioned to the Purpose to be answered. With regard to this particular Road, they have been still more parsimonious and attentive; no Addition has been made to the Rate of the Tolls levied upon it since the 12th of *Queen Anne*, though it was certainly just, this Part of the County should be subject to the same Burdens with the other Parts of it. No more has hitherto been exacted from any Carriage of Burden than a Half-penny, whatever the Size of it, or Number of Horses employed to draw it, may have been.

been.—Nothing is paid for Equipages of Pleasure, and nothing demanded for Horses without Loading; yet, through the rest of the County, a Cart with two Horses, pays four Pence, all the other Articles exempted on this Road are liable in Toll, and that is increased to a very great Amount, in proportion to the Horses in the Draught.

Whether this partial Exemption of the Road in question, flowed from political Opposition, or other Causes, it is here unnecessary to enquire; but this much may be safely affirmed, that the Inhabitants of this Part of the County have no Reason to complain of Partiality, although the Tolls payable should be levied to the utmost Rigour of the Law.

Neither will your Lordships, to whom the Situation and Extent of that Road is well known, believe, that the Demand now made is unnecessary; the Respondents shall therefore proceed to show that it is lawful.

And here the Words of the Statute, the 12th of Queen Anne, are so clear and express, that it is impossible to figure a Doubt upon this Statute. “*It shall and may be lawful to*”
 “and for her Majesty’s Justices of Peace for the Time being,
 “in the said County of *Edinburgh*, (who are hereby nominated and appointed Trustees, for putting this Act in execution,) or any ten or more of them, met at one of their
 “Quarter-sessions, to erect, or cause to be erected, a Gate or
 “Gates, Turnpike or Turnpikes, in or cross *any* Part or Parts
 “of the said High-ways or Roads, and to receive and take
 “for every Horse with a Load, passing each and every Time
 “through the said County to the said City, the Sum of one
 “sixth Part of a Penny *Sterling*; and for every Cart, Wagon,
 “or Sledge, passing *laden* or *unladen*, each and every
 “Time, through the said County, the Sum of one Half-penny *Sterling*.” It is in vain to say, that this trifling Duty has not hitherto been exacted upon this Road, for unloaded Carts, or Carts with Dung. The Justices had Power to erect

a Turnpike or not upon this Road, as they pleased. It shall and may be lawful to the Justices (are the Words of the Statute) to erect Turnpikes in or cross any Part or Parts of the High-way, and to take and receive, &c. But the Statute does not oblige them to erect a Gate upon any particular Road, or to levy a Toll from any particular Species of Carriages. That was a Matter entirely optional to them, which was to be regulated according to their Judgment; neither are they obliged, by said Statute, to apply the particular Produce of any Road to that Road alone; all these Matters were discretionary, and in the Breast of the Justices, with this Recommendation only, that they should be attentive to the Post-road.

Supposing, therefore, they had carried their Complaisance to it so far as to erect no Turnpike upon it at all, this could never have founded the Inhabitants of that Quarter in an Exemption from Custom altogether: It was a Matter of Choice in the Justices how the Toll was to be levied; and though they might, for particular Reasons, allow certain Commodities to pass without paying Toll, this could never found the Proprietors of them in an Immunity from Toll. But, whatever may be in this, there are no *termini habiles* for Prescription in this Case; and it is impossible, that either the erroneous Judgment, Omission, or Favour of former Justices, can tie down their Successors in Office. The Words of the Statute are clear: That every Cart, *loaden or unloaden*, should pay; and the Reason of the Enactment was just, because, by empty Carriages, the Road was certainly rendered worse; and, as People do not go in them for Pleasure, the Presumption was, that, after passing the Turnpike, they were to receive a Loading, from the Profits of which they were sufficiently able to pay the Toll.

As to Dung, although it was true that, at the Date of this Statute, no such Thing was carried to or from the City; yet, could

could the Introduction of a new Commodity, while the Words of the Statute are general, prevent an Imposition from taking place? All Carriages, laden or unladen, are liable in Toll. Dung is a Loading, sometimes a very profitable one; the Conclusion therefore is obvious, it must pay.

If Dung was in use to be transported at this Time, it certainly is not excepted. The only Exception in the Statute is of "Persons riding through the said County, or going in a Coach, Chariot, or Chaise." As to every other thing, therefore, the Enactment is general, and the particular Exception strengthens the Respondents Argument, agreeable to the Rule, that *exceptio firmat regulam in casibus non exceptis*.

It is said, however, that Dung is exempted by the Statute 24th Georgii Secundi; but your Lordships will attend to the Words of the Statute: "Provided always, and it is hereby further enacted and declared, that no Person or Persons shall be charged with any of the Tolls or Duties *aforesaid*, for passing through any of the Turnpikes, to be erected by virtue of this Act, and carrying any Quantities of Stones; —nor for carrying through any of the Turnpikes Dung, or other Manure for Land or Gardens, or Rubbish from the Town of Edinburgh, or from any Village in the said Counties of Edinburgh or Linlithgow."

From whence your Lordships will observe, the Exemption is from the Tolls or Duties *aforesaid*; but what are the Duties *aforesaid*? three Pence *per* Cart, and a Penny for each Horse, for there is not one Word of the Haltpenny Duty in the preceding Part of the Statute. It is clear, therefore, no Exemption could be meant to be given as to it, which is not so much as mentioned, till by a subsequent Clause in the Statute it is abolished.

The Respondents conclude from this last mentioned Clause, that the Duties imposed by the Act, the 12th of Queen Anne,

were to be no otherways exacted, or rather exacted, for no other Carriages or Commodities, than such as they were exacted for at the Date of said Act upon the Post-road. But the Act says no such thing: It declares, "That the small Duties, formerly imposed by the foresaid Act of Parliament of the 12th of her late Majesty Queen Anne, shall cease and determine, excepting only the small Duties payable by virtue of the said Act, upon the Post-road leading from Edinburgh towards Haddington." It is clear, therefore, that every Duty, then payable, whether it was actually exacted or not, remained still payable, and could be exacted after the Date of the said Act upon this Road: But the Toll upon Dung and empty Carts, it has been already shown, was a Duty then payable, and which could have been exacted. Ergo, it still remained payable, and can now, with Propriety, be demanded.

In short, the whole of the Petitioners Argument upon this Head is a Sophism, consisting in an Alteration of the Terms of the Statute, viz. the substituting the Word *paid*, instead of *payable*; which, even if true, could not avail them, as your Lordships would not infer an Alteration of the Justices Right and Powers upon so slight a Foundation. It would require something more express in the Statute; but, as the Words in the latter Part of this Clause, "shall continue and remain payable, as they now are, during the Continuance of this Act," if they need any thing to be supplied, could only be supplied in this Way; "shall continue and remain payable, as they now are payable." It is clear, that it was not the Intendment of this Statute (nor do the Words bear it) to limit the Toll to what was then exacted, but to what was then due: And indeed it would have been a Tautology to have expressed this Meaning in any other Words than those of the Statute from which it is sufficiently

ciently plain, as the Lord Ordinary has most properly found, that said "Act leaves the small Duties, imposed by the Act of the 12th of Queen Anne, upon the Post-road leading from Edinburgh to Haddington, upon the same Footing they were put by the Act of the 12th of the Queen, without any Alteration."

The Respondents shall only further observe, that if this Question depended upon the Statute 24to Georgii Secundi, it could only be decided by the Justices at their Quarter-sessions, whose Order is, by the penult Clause of said Statute, declared final and conclusive, in Matters relating thereto.

But the Respondents have no Occasion at present to plead this, as they have the fullest Confidence in your Lordships Justice, and make no Doubt, that the Court will refuse the Bill, and find Expences due.

ALEX. MURRAY.

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